

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14<sup>th</sup> day of September, two thousand and six.

PRESENT:

HON. WILFRED FEINBERG,  
HON. JOSÉ A. CABRANES,  
HON. PETER W. HALL,  
*Circuit Judges.*

Zheng Xue Ling,

*Petitioner,*

-v.-

No. 04-5848-ag  
NAC

Alberto R. Gonzales, United States Attorney General,\*

*Respondent.*

FOR PETITIONER Michael Brown, New York, New York.

FOR RESPONDENT: Paula D. Silsby, United States Attorney for the District of Maine,  
James M. Moore, Assistant United States Attorney, Bangor,  
Maine.

\* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as the respondent in this case.

1           UPON DUE CONSIDERATION of this petition for review of a decision of the Board of  
2 Immigration Appeals (“BIA”), it is hereby ORDERED, ADJUDGED, AND DECREED that the  
3 petition for review is GRANTED and the case is REMANDED to the BIA for further  
4 proceedings consistent with this decision.

5           Zheng Xue Ling, a native and citizen of the People’s Republic of China, petitions for  
6 review of the October 7, 2004 decision of the BIA denying his second motion to reopen removal  
7 proceedings. We assume the parties’ familiarity with the underlying facts and procedural history  
8 of this case.

9           An alien is limited to one motion to reopen removal proceedings. 8 U.S.C. §  
10 1229a(c)(7)(A); 8 C.F.R. § 1003.2(c)(2). A motion that does not comply with these numerical  
11 limitations can be brought where the alien can establish “changed circumstances arising in the  
12 country of nationality,” but only “if such evidence is material and was not available and could not  
13 have been discovered or presented at the previous hearing.” 8 C.F.R. § 1003.2(c)(3)(ii). The  
14 BIA “has discretion to deny a motion to reopen even if the party moving has made out a prima  
15 facie case for relief.” 8 C.F.R. § 1003.2(a).

16           Ling argues in his petition for review that the Chinese government’s confiscation of his  
17 Falun Gong materials—which he appears to have mailed from the United States to his parents in  
18 China sometime after his initial application for asylum was denied by the IJ and the BIA—  
19 established a change in circumstances within the meaning of 8 C.F.R. § 1003.2(c)(3)(ii). In  
20 support of his second motion to reopen, Ling submitted a letter from his mother stating that after  
21 the confiscation of his Falun Gong materials by Chinese customs authorities, (1) “public  
22 securities [officials] suddenly rushed into our home,” stating that Ling had “colluded with [a]

1       reactionary organization . . . and mailed evil materials to China”; and that those officials then (2)  
2       “ordered” Ling’s father “to urge [Ling] to surrender to China”; and (3) “[l]ater on . . . often came  
3       to our home to harass [Ling’s mother], forcing [her] to urge [her] son to come back to China to  
4       accept punishment.” J.A. at 41-42. In addition, Ling submitted an alleged notice from the  
5       “Villager Committee of Lian Village,” stating that Ling had “join[ed] [a] reactionary evil  
6       religion” and ordering Ling’s parents to “cooperate[ ] with the local government actively” to urge  
7       Ling “to come back to surrender to court, and try for lenity.” The notice also warned Ling that  
8       “[o]therwise, once we capture you, we could punish you very severely.” J.A. at 37.

9             The plain language of 8 C.F.R. § 1003.2(c)(3)(ii) provides that “changed circumstances”  
10       must “aris[e] in the country of nationality,” rather than the United States, and we have  
11       emphasized before that “[a] self-induced change in personal circumstances” does not suffice to  
12       merit the granting of a time-barred or numerically-barred motion to reopen. *See Wei Guang*  
13       *Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006) (rejecting “apparent gaming of the system in an  
14       effort to avoid deportation”); *see also Li Yong Zheng v. U.S. Dep’t of Justice*, 416 F.3d 129, 130  
15       (2d Cir. 2005) (holding that birth of child in the United States does not qualify as “changed  
16       country conditions”). It is unclear on this record, however, whether Ling’s alleged practice of  
17       Falun Gong in the United States after the denial of his asylum application, combined with the  
18       subsequent confiscation of his materials by Chinese authorities, constitutes “changed  
19       circumstances arising in the country of nationality” within the meaning of 8 C.F.R. §  
20       1003.2(c)(3)(ii), or instead an orchestrated effort by petitioner to increase his chances of  
21       successfully remaining in this country. We are also unable to conclude definitively whether  
22       Ling’s “evidence is material and was not available and could not have been discovered or

1 presented at the previous hearing,” 8 C.F.R. § 1003.2(c)(3)(ii), inasmuch as the translated  
2 postmark on the letter from Ling’s mother is dated July 30, 2001, even though the letter itself  
3 refers to the denial of Ling’s asylum application by “immigration and BIA,” the latter of which  
4 occurred on July 14, 2003.<sup>1</sup>

5 In light of the unresolved legal and factual issues raised by the petition for review, we  
6 remand to the BIA to determine (1) whether Ling has established “changed circumstances arising  
7 in the country of nationality” within the meaning of 8 C.F.R. § 1003.2(c)(3)(ii); (2) whether the  
8 evidence presented “is material and was not available and could not have been discovered or  
9 presented at the previous hearing,” 8 C.F.R. § 1003.2(c)(3)(ii); and, if so, whether (3) reopening  
10 is warranted in the exercise of the BIA’s discretion under 8 C.F.R. § 1003.2(a).

11 For the foregoing reasons, the petition for review is GRANTED and the case is  
12 REMANDED to the BIA for further proceedings consistent with this decision. Any pending  
13 request for oral argument in this petition is DENIED in accordance with Federal Rule of  
14 Appellate Procedure 34(a)(2) and Second Circuit Local Rule 34(d)(1).

15 FOR THE COURT:  
16 Roseann B. MacKechnie, Clerk

17 By: \_\_\_\_\_

18 Oliva M. George, Deputy Clerk  
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<sup>1</sup> The translated notice from the “Villager Committee,” by contrast, is dated December 20, 2003, J.A. at 37, seventeen days after the denial of Ling’s first motion to reopen before the BIA, in which Ling had presented evidence that he had become a practitioner of Falun Gong, *see In re Zheng Xue Ling*, File No. A 77-323-033 (BIA Dec. 3, 2003).